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# Klein v. State Appellant's Reply Brief Dckt. 40924

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARC EDWARD KLEIN, )  
)  
Petitioner-Appellant, )  
)  
vs. )  
)  
STATE OF IDAHO, )  
)  
Respondent. )  
\_\_\_\_\_ )

S.Ct. No. 40924  
Custer Co. Case CV-2012-56

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REPLY BRIEF OF APPELLANT

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Appeal from the District Court of the Seventh  
Judicial District of the State of Idaho  
In and For the County of Custer

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HONORABLE JOEL E. TINGEY  
Presiding Judge

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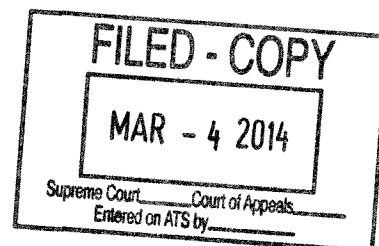
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## II. ARGUMENT IN REPLY

- A. The District Court Erred in Summarily Dismissing Mr. Klein's Claim that His Right's Were Violated and Guilty Plea Infirm when the State Failed to Disclose Impeachment Evidence Regarding the Credibility and Reliability of Fred Rice

In his Opening Brief Mr. Klein explained how the district court erred in summarily dismissing his post-conviction claim for relief because the State's failure to disclose *Brady* material violated his rights under the Fifth and Fifteenth Amendments to the United States Constitution, as well as Article 1, § 13 of the Idaho Constitution. In response the State argues it was not required to disclose the *Brady* material regarding Fred Rice prior to entering into a plea agreement with Mr. Klein because the United States Constitution does not require the disclosure of impeachment evidence absent a trial. The State also attempts to argue that Mr. Klein was not prejudiced by the State's failure to produce this evidence. Finally, the State argues the Custer County prosecuting attorney did not know Fred Rice's credibility had been tarnished and therefore the State had no duty to disclose this information.

Relying on *United States v. Ruiz*, 536 U.S. 622 (2002) and its progeny, the State asserts it was not required to disclose the impeachment evidence regarding Fred Rice prior to entering into a plea agreement with Mr. Klein. As explained in his opening brief, the circumstances here, where Mr. Klein entered an *Alford* plea, are much different and distinguishable from *Ruiz*.<sup>1</sup> As

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<sup>1</sup> The State asserts Mr. Klein should be forbidden from explaining how *Ruiz* is distinguishable because this argument was not raised below. Brief of Respondent, p. 8. Neither party in their opposing motions for summary judgment referenced or cited *Ruiz*. The district court referenced *Ruiz* for the first time in its Memorandum Decision and Order on Motion for Summary Judgment, Summary Dismissal ("Memorandum Decision") filed on August 15, 2012. R. Vol. 2,

previously explained by Mr. Klein, when a defendant lacks conclusive knowledge of his guilt or innocence, as is the case here, the lack of pre-plea disclosure of *Brady* material is significant and necessary in order to prevent miscarriages of justice.

Moreover, *Ruiz* does not end the inquiry into whether or not Mr. Klein's guilty plea was infirm even though that is all the State addresses in its response. The district court held "there was no constitutional requirement to disclose Rice's prior inconsistent testimony."

Memorandum Decision, p. 11. In his Opening Brief Mr. Klein set forth how *Ruiz* is not determinative in this case, stating, "the disclosure of *Brady* material is vital to ensure the voluntary and intelligent nature of a plea pursuant to a plea agreement." Opening Brief, p. 14. Such a proposition is not without support in the law. The Idaho Court of Appeals held that in certain circumstances the State's failure to disclose *Brady* material could give rise to a guilty plea being entered ignorant of such crucial facts that the plea may not have been knowing and intelligent. *State v. Gardner*, 126 Idaho 428, 434, 885 P.2d 1144, 1150 (Ct. App. 1994). Mr. Klein again raised the validity of his plea and whether it was knowing, voluntary, and intelligent when arguing his prior counsel's complete failure to investigate the case constituted ineffective assistance of counsel. Opening Brief, p. 26.

Next, the State's argument that Mr. Klein was not prejudiced by the State's failure to disclose the information regarding Fred Rice fails for the same reasons the district court's Memorandum Decision was in error – both misunderstand and grasp the significance of Rice's

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p. 204 – 217. Nevertheless, on direct appeal Mr. Klein is certainly permitted to argue and explain how the district court's reliance on *Ruiz* was in error and should be reversed.

proposed testimony and the necessity that he be considered credible. The State argues it still “had the option simply not to utilize Cpl. Rice or his reconstruction report. The state additionally possessed the separate report completed by Cpl. Bivins, which also found that Klein caused the accident by passing into Twitchell’s lane of travel.” Brief of Respondent, p. 11. Mr. Klein previously explained how this assertion completely misunderstands the reports of Bivins and Rice because in actuality they are inconsistent and contradict each other, therefore that explanation will not be repeated here. *See* Opening Brief, pp. 12 – 13.

The State also argues Mr. Klein was not prejudiced because he somehow received a favorable plea bargain. Brief of Respondent, p. 11 – 12. A plea bargain for someone who most likely did not commit the crime charged is not “favorable.” The State points out the Mr. Klein testified at the evidentiary hearing that he thought the plea agreement was fair at the time. This is true – at the time Mr. Klein did not know that Fred Rice’s credibility as an expert witness was suspect and questionable nor that he very well may not have been the cause of the accident. *See* Exhibit 1.

Finally, in arguing that Mr. Klein was not prejudiced, the State suggests its case was bolstered by additional evidence beyond Rice’s report. Brief of Respondent, p. 12. In making this argument the State fails to address any of the finding and conclusions contained in the FDJ Accident Reconstruction Report that actually point out the numerous weaknesses in the State’s case. Exhibit 1.

With regards to the State’s position that the Custer County prosecuting attorney was unaware that a district court in the State of Idaho had found Fred Rice had given wholly opposite

opinions under oath, again, this argument lacks merit. First and foremost, implicit in the district court's Memorandum Decision is that the State was aware of this knowledge.<sup>2</sup>

That being said, the State of Idaho was the party prosecuting the criminal action against Mr. Klein. The duty to disclose under *Brady*, applies not only to evidence actually known to the trial prosecutor, but also to evidence known to those acting on the State's behalf. The State knew of this evidence. Fred Rice was obviously aware he had offered wholly opposite opinions when he testified in the Ellington case in 2006. The Idaho Attorney General's Office, the chief law officer of the State of Idaho, was put on notice on June 30, 2008, that Fred Rice testified to wholly opposite opinions when it was served with Mr. Ellington's Motion to Suspend the Appeal in *State of Idaho v. Jonathan W. Ellington*, Supreme Court Case No. 33843. The Kootenai Prosecuting Attorney's Office knew that Judge Luster found Fred Rice incredible and unreliable in March 2009 when it was served with Judge Luster's decision. Finally, the Supreme Court's decision in *State of Idaho v. Jonathan W. Ellington*, 151 Idaho 53, 253 P.3d 727 (2011) wherein the Court concluded Fred Rice provided false testimony was issued on May 27, 2011, seven days prior to Mr. Klein's conviction becoming final.

Because Mr. Klein established before the district court there was a reasonable probability that had the evidence regarding Fred Rice been disclosed to the defense the result of the proceedings would have been different Mr. Klein's conviction must be reversed.

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<sup>2</sup> Should this Court find the State's knowledge or lack of knowledge determinative of this issue and find that the district court's Memorandum Decision does not implicitly make this conclusion, then this matter should be remanded for further factual findings and proceedings.



B. The District Court Erred in Summarily Dismissing Mr. Klein's Claim that He Received Ineffective Assistance of Counsel when Mr. Klein's Counsel Failed to Timely File a Motion to Withdraw His Guilty Plea

Mr. Klein's trial counsel unexplainably failed to file a motion to withdraw Mr. Klein's guilty plea prior to the district court losing jurisdiction. As set forth in his Opening Brief, as a result Mr. Klein was the recipient of ineffective assistance of counsel. Mr. Klein explained why the motion to withdraw his guilty plea should have been timely filed and in failing to do so, trial counsel was deficient. Furthermore, there simply is no strategic reason or valid excuse not to timely file the motion when sufficient time to do so existed. The State argues in response that Mr. Klein's trial counsel was not deficient and that even if counsel was deficient Mr. Klein was not prejudiced by the deficiency. Mr. Klein will not rehash why trial counsel was deficient and instead will respond to the State's argument regarding prejudice.

In order to establish prejudice, all Mr. Klein must show is a reasonable probability that, but for trial counsel's inadequate performance, the outcome of the proceeding before the district court would have been different. "Furthermore, in a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the court properly may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." *Huck v. State*, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993).

Had the motion to withdraw guilty plea been timely filed, it was likely Mr. Klein would have prevailed on that motion. Because Mr. Klein would have been withdrawing his guilty plea after he was sentenced, he would have needed to establish that doing so would have corrected a

“manifest injustice.” *State v. Freeman*, 110 Idaho 117, 714 P.2d 86 (Ct. App. 1986). Even with that stricter standard applied, Mr. Klein would have likely prevailed.

Again, there were no witnesses to the accident. Based solely upon the Rice Accident Reconstruction Report and his attorney’s representations, Mr. Klein entered an *Alford* plea to the charge of vehicular manslaughter. Now however, there is “very strong evidence that Cpl. Rice perjured himself during the Ellington trial.” *State v. Ellington*, 151 Idaho 53, 253 P.3d 727, 749 (2011). According to the Supreme Court of Idaho, the State’s proverbial star-witness is:

[A] police officer with twenty five years of experience, who teaches accident reconstruction to other Idaho police officers and who has testified for the State on many other occasions regarding accident reconstruction, to the stand and . . . testified falsely according to the well-established principles of accident reconstruction . . . as well as his own testimony in the *Ciccone* case and his own training materials.

*Id.* There is no longer any way Fred Rice could be considered credible or reliable. In light of the circumstances, including the fact that Mr. Klein entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), upholding a conviction relying solely upon a perjurer’s report constitutes a manifest injustice and the motion to withdraw his guilty plea would have been granted had it been timely filed.

C. The District Court Erred in Denying Mr. Klein’s Claim for Relief that He Received Ineffective Assistance of Counsel when Trial Counsel Failed to Investigate the Case or Meaningfully Consult with an Independent Accident Reconstructionist

The district court concluded trial counsel’s conduct did not fall below an objective standard of reasonable professional performance. The district court also concluded there was no resulting prejudice from the alleged deficient performance. In his Opening Brief Mr. Klein detailed how the district court’s conclusions were misapplications of the law to the facts


presented at the evidentiary hearing. In response, the State argues nothing beyond the district court's conclusions. The State fails to respond to any of the detailed facts demonstrating trial counsel's failure to conduct any sort of investigation in the case or consult with an independent accident reconstructionist in a meaningful way. Opening Brief, pp. 22 – 26.

For instance, the State fails to even attempt justifying trial counsel's stopping at the scene maybe two times as an adequate investigation in a vehicular manslaughter case. The State makes no attempt to justify trial counsel's decision to not take any pictures or measurements, to not inspect either of the vehicles involved, to not inspect any of the physical evidence in the case, and to not research the history of the victim's vehicle. As detailed in Mr. Klein's Opening Brief – more is required of defense counsel. The information trial counsel would have learned had he retained an independent accident constructionist is alarming in light of Mr. Klein's guilty plea. Trial counsel admitted that had he known Rice's accident reconstruction report contained the significant errors it does – as Mr. Klein established at the evidentiary hearing – that his advice to Mr. Klein about pleading guilty would have been different.

### **III. CONCLUSION**

For all the reasons set forth above and in Mr. Klein's Opening Brief, this Court should reverse the district court's judgment dismissing his post-conviction claims and remand this case for further proceedings.

Respectfully submitted this 4<sup>th</sup> day of March 2014.


A handwritten signature in black ink, appearing to read 'Jeffrey Brownson', written over a horizontal line.

Jeffrey Brownson  
Attorney for Marc Klein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of March 2014, I caused two true and correct copies of the foregoing document to be mailed to:

Idaho Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, ID 83720-0010

  
\_\_\_\_\_  
Jeffrey Brownson